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COMMERCE FOR BIS (BROWN, DENYER AND CRISTOFARO)
NSC FOR LUTES
WINPAC FOR WALTER

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TAGS: [PARM](#) [PREL](#) [KTIA](#) [OPCW](#) [CWC](#)
SUBJECT: CWC: WRAP-UP FOR THE WEEK ENDING JANUARY 29, 2010

REF: A. THE HAGUE 51
[1](#)B. THE HAGUE 29
[1](#)C. GRANGER-ISN/CB E-MAIL (01/15/2010)
[1](#)D. MIKULAK-DEL E-MAIL (01/22/2010)
[1](#)E. SMITH-ISN/CB E-MAIL (11/22/2009)
[1](#)F. STATE 7592

Classified By: Janet E. Beik for reasons 1.4 (B) and (D)

This is CWC-08-10

SUMMARY

[1](#)1. (SBU) After the positive opening meeting of the destruction deadline consultation (Ref A), delegations at the Organization for the Prohibition of Chemical Weapons (OPCW) turned their attention to the next potentially difficult consultation on "situations not foreseen" by the Chemical Weapons Convention (CWC). U.S. Delreps met with the facilitator for that consultation, Michael Hurley (Ireland), privately on January 22, and then sequentially with the OPCW Legal Advisor, and the UK, South African and Russian delegations on January 25 and 26. The Western European and Others Group (WEOG) also discussed the issue again (Refs A and B) on January 26. Hurley convened the second meeting of his consultation, and his first of the new year, on January 27. Details of all of these meetings follow.

FACILITATOR ON HIS DRAFT PAPER

[1](#)2. (C) Delreps Beik, Granger and Legal Counselor Kim met with Michael Hurley (Ireland) on January 22 to discuss his draft paper for the "situations not foreseen" consultation (Ref C), having received Washington's initial guidance to request that he return to earlier drafts from the UK and South Africa (Ref D). Hurley said he fully expected major changes to be proposed to his draft, but cautioned against going back to the South African draft (particularly the latest version with the

Iraq paragraph, sent to the Department in Ref E). The UK draft was never public, shared in confidence only with a small handful of delegations, and Hurley said the South Africans would not accept it.

13. (C) Hurley explained that he is trying to steer a careful line between the South African agenda and potential "mischief" from Iran and others. Many delegations, he said, have concerns about the whole exercise, feeling blindsided by the small group discussion at the Executive Council (EC) session in October and not understanding what the EC agreed. In December, when he was about to share his draft paper with the U.S. and UK, he said he was called by the Director-General (DG) and sent to the Legal Advisor. The delay in his paper was due to consideration of the draft by the OPCW Technical Secretariat (TS). The Legal Advisor, he said, was comfortable with the shape of the paper and the content. The Verification Branch has also been actively interested in it. Delrep asked about a connection to future verification of the bunkers in Iraq. Hurley responded that the TS had not overtly included Iraq as part of the picture; he felt the South African attempt to add Iraq to their draft is more problematic in that regard than his draft. Even if the guidelines were cited for avoiding standard verification procedures in Iraq, he said, the Council would still have to take up the matter. He also said he did not see the Iraqi bunkers as falling under the "discovery" of new weapons that he emphasizes throughout his draft.

14. (C) Hurley believes South African Ambassador Goosen will honor his commitment to keep this process oriented toward the future. Goosen, in his view, wants to claim credit for producing a set of guidelines that plug a gap in the Convention as the outcome of this consultation. If crossed, Hurley said, Goosen would not hesitate to gin up support for more extreme avenues of discussion (of what occurred in Iraq after 2003), which Iran and others might gladly pursue. The Iranian delegation to date has been positive, Hurley said, in his meetings with them.

15. (C) Hurley agreed that the draft paper is too long and perhaps overly repetitive; he thought it easier to remove language than add in later. He was following a logic-gram that does mirror the verification annex. In response to Delreps' questions, Hurley said that the proposed guidelines are not intended to be legally binding, and that he is open to ways to make that intention clear. He noted that the guidelines probably would be appended to an EC decision and the language of that decision could help frame the status of these guidelines and their relationship to the Convention. He was open to the prospect of working on the decision language along with the guidelines, rather than sequentially, if that would help. He did not see this text as legally binding in any sense, but remains open to language suggestions that would ease that concern. One of the strong points of consensus he found in the November facilitation meeting was agreement that any guidelines would not in any way impact the sanctity of the Convention.

16. (C) On "force majeure", Hurley intended to frame the concept of "unforeseen situations" which, he said, "makes everyone nervous." He tied it to new discoveries, also a deliberately chosen term to avoid the legal issues of "possession and control." He expressed his openness to other formulations that would limit the situations for which the guidelines would apply. When Delreps asked why the limitation to non-States Parties had

dropped out of the draft, broadening the paper immensely, Hurley was genuinely surprised, citing the language from EC-58 that mandated this facilitation which is not limited to non-States Parties. He thought returning to that narrow a scope might require taking his remit back to the Council.

17. (C) After a lengthy discussion of the 30-day reporting requirement included in the draft guidelines, Hurley said he had tried to meet earlier U.S. concerns about any set timelines by adding the safety considerations and a potential series of reports with no real information other than that CW had been discovered. South Africa, he said, feels strongly that reports have to come back to OPCW and the political bodies. Again, he said he was open on how to capture that but felt there will be strong pressure for some kind of reporting requirement (deadline).

18. (C) Hurley described his plan to introduce the draft paper on January 27, expecting delegation comments and reactions from capitals at the next meeting, February 3. He would then take Qmeeting, February 3. He would then take changes/proposals both in the meetings and privately. Delreps discussed a pause after these sessions for a new draft for discussion after the February EC, with the possibility for bilateral meetings with experts on the margins of the EC, but without discussion in the EC itself except his report that consultations have taken place and that he is working on a new draft. Delrep expressed appreciation to Hurley for all of his work and said that we want him to remain in control of the process; Delreps would be consulting with others on possible ways forward and would stay in close touch with him as things progressed.

LEGAL ADVISOR'S VIEWS

19. (SBU) Delreps Beik, Granger and Legal Counselor Kim met with OPCW Legal Advisor Santiago Onate on January 25 to discuss USG concerns with the draft paper on "situations not foreseen" by the CWC. Onate confirmed that his office had advised Hurley on the drafting of the paper and would attend the discussions, but said the lead office in OPCW for the issue is the Verification Branch. Onate drew the critical distinction between policy and legal issues, understood the questions and concerns posed by Delreps, and confirmed that the draft guidelines prepared by Michael Hurley are simply a starting point for discussion that can be revised along the way to reflect the appropriate scope and mandate of this facilitation.

110. (SBU) Onate stated that the threshold issue regarding this paper is the policy question of the desired scope of this exercise. Is it limited to conflicts involving a state party on the territory of a non-state party, or will it be more expansive to cover other sorts of situations? All the other issues or decisions flow from this threshold question, but Onate noted that the EC-58 language is ambiguous and could proceed in different directions. He emphasized that the scope is a "political question, not a legal one."

111. (SBU) Onate stated that no one is interested in imposing new legal rights or obligations on the States Parties, nor is anyone interested in making amendments to the Convention. He said that he viewed the guidelines as not legally binding and "unenforceable." In Onate,s view, any guidelines

should be implemented without prejudice to the Convention. Accordingly, the guidelines should focus on technical and procedural details. In response to Delreps' question, Onate agreed that the language of the guidelines could be revised or "softened" so that it would not have the "shalls" and other language indicative of legally binding intent; rather, the guidelines could say that the States Parties are "expected to" or "should" do certain things under certain circumstances. He thought this a fairly simple fix that the consultations could easily make.

¶12. (SBU) On the issue of "force majeure", Onate said that the term is not used in the proposed guidelines, but the concept of an irresistible force or unforeseen event is used throughout Hurley's draft paper. Onate noted that, in his view, force majeure was used in accordance with what he understood to be the traditional international law definition of the term. Onate confirmed that he had spoken to Hurley about the concept, and noted that Hurley did not want to expressly refer to the term, as he was concerned that force majeure could be extended by certain states parties to cover or excuse almost anything under the Convention. Onate also explained that he Qunder the Convention. Onate also explained that he could think of only one precedent where the OPCW had relied on a force majeure in order to suspend a treaty obligation; in that case, the OPCW agreed to temporarily postpone an inspection of a facility in France because there was labor unrest and potential for trouble at the facility.

¶13. (SBU) Onate agreed with Delreps that the current draft guidelines could be read more broadly than conflicts involving non-State Parties, and in fact could be read to cover other types of situations. When asked specifically about future inspections in Iraq, he said that those would be covered under the security provisions of the Convention and did not require guidelines such as these. When asked about the concept of "discovery" and its potential application to Abandoned Chemical Weapons (ACW), Onate replied that ACW is clearly envisaged by the Convention and has a well-established practice. He did not see these proposed guidelines affecting that issue, as their focus is related to verification.

UK DELEGATE

¶14. (C) Following the meeting with Legal Advisor Onate, Delreps met with UK Delegate Karen Wolstenholme to discuss Hurley's draft paper and the upcoming consultation. Delrep broadly conveyed Washington's concerns with the paper to Wolstenholme, who posited that South Africa just wanted some text on the table and seems willing to accept almost anything as long as they get a final product. According to Wolstenholme, London could live with the draft paper but has some concerns with its inconsistencies, sees no need to include provisions for storage of CW, and would prefer to limit any use of force majeure. She said she planned to say nothing in the consultation and let others voice their concerns, including Germany and Italy, who have very strong feelings about the whole exercise.

¶15. (C) When Delrep asked about introducing text from the UK's draft paper -- which was only shared confidentially with a few delegations in October and never formally circulated -- Wolstenholme

responded that it might be possible to table it as an alternative to, or modification of, the South African draft paper, but only if and when resistance to Hurley's paper strengthens. She said she would check with London on whether they would agree to the UK sponsoring text in the consultations. Wolstenholme noted that Hurley's first consultation in November had discussed the scope of the consultations but had not reached any agreement aside from needing to continue the discussion. She suggested that further discussion could be engineered to pave the way for introducing new draft language, whether the UK paper or another facilitator's draft.

SOUTH AFRICAN AMBASSADOR

¶16. (C) Delreps Beik and Granger met with South African Delegate Marthinus van Schalkwyk on January 26; South African Ambassador Peter Goosen, who insisted on attending the meeting as well, dominated much of the discussion. Throughout, Goosen continued to take potshots at the U.S. position as often as possible while alternately portraying himself as a friend and looking out for U.S. interests. After Delrep gave a broad overview of U.S. concerns with the scope, length and legalistic tone of Hurley's draft paper, Goosen retorted "that's what you get when you choose an honest, transparent facilitator" and added, "You should have taken Marthinus (as facilitator) when we offered him but now you're stuck with Hurley."

¶17. (SBU) When asked about the status of the South African draft paper, Goosen said he sees only one paper on the table currently: the facilitator's.

Like the U.S. and the UK, Goosen had expected to see a draft of Hurley's paper before it was circulated but didn't. He had thought that Hurley's draft would merge the South African and UK papers, and he agreed that Hurley's paper needs to be revised. Goosen would not oppose the reintroduction of the South African paper -- only if done by Hurley -- but said pointedly, "You just like ours now that you've seen Hurley's." Delrep noted that Washington would want changes to some of the substance and specific language in the South African draft but liked its length and format. Goosen suggested that it would be best to have only a very general discussion on Hurley's paper during the consultation and then give the facilitator a chance to redraft it. Goosen expressed no sense of urgency but admitted wanting to have guidelines to agree by the Conference of the States Parties in December.

¶18. (SBU) Goosen stressed his key concern in the whole exercise is addressing an issue of principle. According to Goosen, U.S. and UK destruction of chemical weapons (CW) in Iraq took place outside of the CWC; he admitted that the rules of the Verification Annex did not work in the situation but countered that States Parties still need to play by the rules. Goosen claimed that India, Russia and others feel similarly, though he recognized Indian and Russian unease at the broad scope seemingly conferred by the consultation's title. Regardless of its title, Hurley's consultation, in Goosen's view, should make sure a similar situation does not happen "with vague reports delivered six years later."

¶19. (SBU) Goosen then spoke against reopening discussion on the scope of the consultation for

fear that it would turn into an interminable, circular debate similar to what he saw as a complicated discussion during the first consultation in November. Van Schalkwyk added that opening up the scope would give Russia, India, China and others a chance to target the U.S. and the UK on what was done in Iraq. Both Goosen and van Schalkwyk were adamant that they wanted to avoid this. Goosen told Delreps that Iran, India and Russia believe the U.S. was non-compliant in Iraq and that they initially wanted to request a legal opinion supporting that assertion. Reiterating his desire not to "tar and feather" the U.S. and the UK, Goosen said it would be useful for the exercise for the U.S. and the UK to share their "practical experiences" to inform the guidelines and make them realistic.

120. (SBU) According to Goosen, the consultation is not -- and should not be -- limited to non-States Parties. Non-States Parties cannot be bound by the CWC, so the focus must be on States Parties and specifically on possession and control: what to do when CW or CW capability falls into the hands of a State Party. Goosen also raised the possibility of broadening the consultation to look at cases of interdiction. Throughout the meeting, Goosen noted his flexibility on the final product but reaffirmed the need for timelines and for protecting the CWC. Van Schalkwyk said that the only thing that is "not foreseen" is why a State Party could not comply with the CWC, including the Verification Annex. He continued that security and safety concerns could result in the only legitimate unforeseen situation. Summarizing the South African view of what the final guidelines should look like, van Schalkwyk said that a State Party ultimately should prove:

- discovery, possession and control;
- complete destruction;
- the absence of any remnants.

This would constitute the complete information package at the end of the process and would represent a lower standard than currently set by the Verification Annex.

RUSSIAN DELEGATION: WAITING FOR MOSCOW

121. (SBU) On January 26, Delreps Beik, Granger and Legal Counselor Kim met with the Russian delegation, including Deputy PermRep Konstantin Gavrilov and Delegates Vladimir Ladanov, Maxim Musikhin and Denis Chekhonin. Gavrilov stressed there is no need to push the "situations not foreseen" issue: his mantra throughout the meeting was to slow things down. In his usual style, Gavrilov dismissed the entire initiative as a South African attempt to be relevant, nothing more. He said that Moscow is still reviewing Hurley's draft paper and had not provided guidance yet.

WEOG DISCUSSION ROUND 3

122. (SBU) During the weekly meeting of the Western European and Others Group (WEOG) on January 26, Delrep added "situations unforeseen" to the agenda, following two previous WEOG discussions (Refs A and B). Delrep noted that there still appear to be differences of opinion on the purpose of the consultation. She suggested that addressing the scope would be useful before starting a drafting exercise on the facilitator's guidelines.

123. (SBU) Italian Delegate Giuseppe Cornacchia

responded that the scope of the consultation had moved unexpectedly and that Hurley's draft guidelines go too far in trying to define situations which are neither foreseen nor predictable. He expressed his fear that widening of the consultation's scope will make a solution even more elusive. UK Delegate Wolstenholme noted that there was no agreement on scope following Hurley's first consultation in November. Echoing Delrep's comment, she questioned whether the consultation would be ready for such a legalistic document as Hurley's draft and recommended returning to a simpler paper. Wolstenholme opined that it would help knowing South Africa's aims as the instigator of the exercise but admitted that they are far from clear. Turning to Hurley's draft guidelines, French Delegate Raja Rabia reported that Paris has a number of concerns with the text, including putting too much burden on the "discovering" State Party. Rabia also shared French views that the minimum timeframe for reporting should be no less than 60 days with at least 6 months before the initial "declaration" is required. She concluded that the guidelines should focus on the need to inform the TS rather than other obligations.

THE CONSULTATION -- POLITE CONFUSION

¶24. (SBU) On January 27, Facilitator Michael Hurley chaired his second consultation on "situations not foreseen" and introduced his draft guidelines. He acknowledged that the draft was longer than expected but explained this was due to trying to accommodate as wide a range of circumstances as possible. Hurley also explained that he opted for possible. Hurley also explained that he opted for firm language (i.e., "shall" rather than "could") for clarity and precision but that the decision adopting the guidelines could explain their status. Expounding on his mandate from the EC-58 report, Hurley said it was to explore situations where the implementation of procedural norms either would not be possible or would be impeded. He admitted that the word "unforeseen" had become an irritant and source of confusion; this is why he chose to focus on operational methods in his guidelines rather CWC concepts. In this vein, Hurley chose an alternative formulation when referring to "possession and control" in order to distinguish the guidelines from Article I. He provided a section-by-section overview of his draft, highlighting the final section (paragraphs 16-20) as the most important in confirming the authority of the policy-making organs, even if their role is ex post facto. Hurley stressed that he tried to stay close to the Convention and to accepted norms, including generally-agreed concepts of international law (i.e., force majeure), and noted the only new idea in his draft is the 30-day timeline for reporting.

¶25. (SBU) South African Delegate van Schalkwyk made the first intervention, noting that he was awaiting guidance and could not engage substantively. However, he noted the purpose of the guidelines should not be to displace the Convention but to address situations where States Parties face practical difficulties in implementation. Hurley agreed that practical difficulties should not detract from CWC obligations.

¶26. (SBU) Italian Delegate Cornacchia noted his support for Hurley's facilitation but also his difficulty with the concept, stating it would be impossible to cover all imaginable situations. He

also pointed out that the CWC is clear on the obligations of discovering and territorial State Parties but said that discussing non-States Parties would be a different matter. French Delegate Rabia then intervened to say that France had expected a list of "best practices" rather than guidelines creating more obligations for States Parties. Echoing Cornacchia's statement on the distribution of responsibilities, she said the guidelines unfairly place the entire burden on the discovering state. Finally, Rabia stated French opposition to the proposed timelines for reporting, suggesting instead at least 60 days for the initial report and 6 months.

127. (SBU) Like others, Indian Delegate Pankaj Sharma noted his comments were preliminary and that he was waiting guidance from capital on Hurley's draft. Echoing Cornacchia, Sharma said he is trying to understand what the consultations and guidelines are trying to address. He reiterated his previous request for details on similar exercises in other conventions, and he asked for an explanation of the difference between "unforeseen events" and "irresistible force" and why the two formulations had been used. Like Sharma, Mexican Delegate Blanca Polo asked what the consultation is trying to accomplish and expressed a need for clarity before proceeding further. Referring to the concept of discovery in Hurley's draft, she said it is not clear where discovery is to take place; Polo stated that the Convention is clear on what should be done in a State Party, but not in a Qwhat should be done in a State Party, but not in a non-State Party.

128. (SBU) Russian Delegate Gavrilov said he also is awaiting guidance but stressed the need for consensus on the scope of discussion before the consultation could proceed. He stated that any agreed guidelines could only add value to help implement the Convention and not supersede it. Chinese Delegate Li Dong stated that Beijing is still examining the complicated legal issues raised by the consultation but affirmed that the guidelines should not affect the Convention, including the Confidentiality Annex. Australian Delegate Mike Byers read a prepared statement with preliminary comments that the guidelines' language should be broad and general enough to accommodate unpredictable conflict situations. Byers said that the three key dimensions of the guidelines should be to address:

- the threshold for triggering them (e.g., safety, security, military necessity or impossibility);
- the manner of complying with the CWC (as substantively as possible);
- the timeframe for complying with the CWC (as soon as practicable).

129. (SBU) Echoing sentiments conveyed in most other inventions, German Delegate Ruth Surkau expressed unease with the title of the guidelines and the consultation, explaining that the Convention provides the framework for addressing all situations and that nothing can be foreseen outside of the CWC. She stressed the need to define the scope more clearly as well as to insure the role and authority of the policy-making organs are not undermined. Dutch Ambassador Lohman joined the foray by stating his puzzlement with what is being discussed and asking for clarity on the relation of the guidelines to the Convention. Delrep noted that previous interventions had reflected many of Washington's questions but highlighted that the draft guidelines appear legalistic in form and too much like an annex to the Convention. She suggested that discussion at next week's

consultation focus on general comments rather than developing into a long, drawn-out drafting exercise.

¶30. (SBU) Responding to the question posed by the Indian delegate, Legal Advisor Onate gave a number of examples of force majeure in other conventions and stated that it is a normal concept usually associated with natural occurrences but also human ones, such as acts of war, insurrections, etc. Onate stated that the Convention clearly authorizes the policy-making organs to deal with situations where full implementation of some parts of the Convention, including the Verification Annex, is not possible. Describing the genesis of the consultation, Onate said that two States Parties came into possession of CW on the territory of a non-State Party -- a situation envisaged in Article I -- and that their destruction of the CW was in line with the Convention's main objective. However, he explained that the destruction was done outside of normal procedures, which created the problem being addressed. Onate continued that Hurley's paper does not create new obligations but rather clarifies what to do when certain circumstances come into play.

¶31. (SBU) Brazilian Delegate Marcelo Ramalho said Brazil currently does not have a position on the guidelines or the consultation because it is not clear what is being addressed. He also asked about situations of discovery on the high seas and in outer space. Onate responded that the Convention clearly does not deal with the high seas or outer space. Lebanese Delegate Rami Adwan stated two problems with the draft guidelines: legal and procedural. The legal problem stems from avoiding the term "force majeure" and forcing the use of another suitable, agreed term. The procedural problem results from the guidelines going beyond the available flexibility of dealing with States Parties' practical breach of their obligations. Venezuelan Delegate Jorge Petit (speaking for the first time in any consultation) agreed with the remarks of the Lebanese and Brazilian delegates and asked for clarification and examples of "irresistible force." He also suggested the possibility of cooperation and coordination with other international organizations, including the International Maritime Organization and IAEA. The Thai delegate supported the Venezuelan delegate's intervention and asked for more clarification on the concept of the consultation and the guidelines before questioning whether they were fully compatible with the mandate given by EC-58.

¶32. (SBU) Before closing the meeting, Hurley tried to reach agreement on the title to be used in referring to the consultation. Unable to, he said the issue would need to be finalized during the next consultation.

¶33. (SBU) DEL COMMENT: Despite some expectations that the consultations would go quickly and reach agreement on guidelines early in the year, it is clear that this is just the beginning of a long process. Aside from South Africa and the facilitator, no one sees any urgency in moving forward as long as there remains confusion with the purpose and expected results of the entire endeavor. END COMMENT.

¶34. (U) BEIK SENDS.

LEVIN